THE HIGH COURT OF SIKKIM : GANGTOK

Criminal Revision No.4 of 2005

In the matter of a petition under section 397 read with sections 401 and 482 of the Code of Criminal Procedure, 1973

and

in the matter of

Kharka Bahadur Pradhan,
S/o Late Bali Narayan Pradhan,
R/o Tinek Busty, Nandugaon,
South Sikkim. **..... Revision Petitioner**

versus

Smt. Bhuma Devi Pradhan,
W/o Shri Kharka Bahahdur Pradhan,
R/o Tinek Busty, Nandugaon,
South Sikkim. **..... Respondent**

For the Revision Petitioner : Mr. J. K. Chandak, Advocate & Mr. Umesh Gurung, Advocate.

For the respondent : Mr. A. K. Upadhyaya, Senior Advocate/Legal Aid Counsel & Manita Pradhan, Advocate.

PRESENT: THE HON'BLE MR. JUSTICE A. P. SUBBA, JUDGE.

Last date of hearing : 8th September, 2005.

DATE OF ORDER : 23RDSEPTEMBER, 2005.

O R D E R

A. P. Subba, J.

The present revision petition filed by Kharka Bahadur Pradhan of Tinek Busty, Nandugaon, South Sikkim under section 397 read with sections 401 and 482 of the Code of Criminal Procedure, 1973 is directed against the order

dated 23rd March, 2005 passed by the learned Judge, Family Court, Sikkim at Gangtok in Family Court Case (Crl. Misc.) Case No.16 of 2004.

2. As per the facts set out in the revision petition, the present petitioner Kharka Bahadur Pradhan was paying monthly maintenance allowance of Rs.1,500/- to his wife Smt. Bhuma Devi Pradhan, the respondent herein in compliance with order dated 2nd June, 2001 passed by the Family Court, Gangtok in Family Court Case no.67 of 2001. The amount so payable was being recovered by deducting the same from the monthly salary of the petitioner till his retirement from Government Service in the month of August, 2004. On his retirement, the payment of the monthly maintenance allowance to the respondent by way of deduction from the monthly salary of the petitioner got automatically discontinued.

On his retirement, the petitioner received an amount of Rs.1,21,000/- towards his retirement benefits but he did not pay any amount to the respondent as a token of her share from such retiral benefits. However, he deposited a sum of Rs.50,000/- in his Saving Bank Account bearing no.4120 at the State of Bank of Sikkim, Jorethang branch at South Sikkim. Since she was paid no share from the retiral benefits, she filed Family Court Case

(Crl. Misc.) no. 16 of 2004 in the Family Court at Gangtok seeking issue of a direction to the opposite party to pay Rs.50,000/- i.e. the amount deposited in his bank account to the petitioner for her maintenance.

3. The Family Court first forwarded the matter to the District Court Lok Adalat for reconciliation. Since no reconciliation was possible, the Lok Adalat returned the matter to the Family Court. On receiving the matter back from the Lok Adalat, the Family Court referred the matter to the Family Court Counsellors for making efforts for amicable settlement, as required under a Family Courts Act, 1984. However, no settlement was possible before the Family Court Counsellors also. Thereafter, the learned Family Court heard the parties and by order dated 23rd March, 2005 rejected the prayer for issue of direction to the petitioner to pay Rs.50,000/- to the respondent but at the same time held that, considering the change in the circumstances of the petitioner following his retirement from service, the respondent shall be entitled to receive maintenance allowance of Rs.400/- per month in place of Rs.925/- per month from the petitioner, with effect from the month of November, 2004 in modification of the order dated 2nd June, 2001 passed earlier in Family Court Case no.67 of 2001. It was further directed that the

maintenance amount of Rs.400/- shall be deducted from the pension payable to the petitioner from the month of April, 2005. It is against this order relating to attachment of the monthly pension of the petitioner that the present revision petition has been filed.

4. Further case of the petitioner is that, the learned Family Court in passing the impugned order, failed to appreciate that the petitioner had become a pensioner after having retired from government service and that the amount of pension being received by him was duly protected from attachment under the provisions of section 60(g) of the Civil Procedure Code, 1908. Therefore, the impugned order being contrary to law was liable to be quashed.

5. Mr. J. K. Chandak, learned counsel for the petitioner and Mr. A. K. Upadhyaya, learned senior counsel and legal aid counsel assisted by Ms. Manita Pradhan, counsel for the respondent were heard.

6. Mr. J. K. Chandak, the learned counsel submitted that the pension payable to the petitioner falls within the exemption provided by section 60 of the Code of Civil Procedure and, as such, it was not liable to attachment. It was his submission that the impugned order being an order passed by the Family Court was hit

by the above said provisions of law, and as a result, the impugned order so far as it relates to attachment of pension was bad in law and liable to be quashed. Mr. A. K. Upadhyaya, learned senior counsel, appearing as legal aid counsel submitted that the present revision petition was not maintainable in so far as it was not filed under the appropriate statutory provision, and that even if it were filed under the appropriate statutory provision, the order of maintenance passed by the Family Court under section 125 of the Criminal Procedure Code would fall outside the purview of the provisions of section 60 of the Code of Civil Procedure. Thus, according to him, the revision petition was liable to be dismissed in any case.

7. As can be seen from above, the petitioner has no objection to the order for payment of maintenance allowance @ Rs.400/- from the month of November, 2004. His only objection relates to the direction for deduction of the amount from the monthly pension payable to him on the ground that such pension is protected from attachment by section 60(g) of the Code of Civil Procedure. Therefore, the only question that arises for consideration is whether the impugned order is hit by the provision contained in sub-section (g) of section 60 of the Code of Civil Procedure and if so, whether the order can be maintained.

8. In order to consider the rival contentions raised by the parties, it would be necessary to take a look of the provision of law relied on by the parties. As stated above, the learned counsel for the petitioner in support of his contention, referred to and relied on the provision contained in section 60 of the Code of Civil Procedure. For the sake of convenience of reference, we may reproduce the relevant part of section 60 of the Code of Civil Procedure as follows:-

> **"60. Property liable to attachment and sale in execution of decree.–**(1) The following property is liable to attachment and sale in execution of a decree, namely, lands, houses of other buildings, goods, money, bank notes, cheques, bills of exchange, hundis, promissory notes, Government securities, bonds or other securities for money, debts, shares in a corporation and, save as hereinafter mentioned, all other saleable property, movable or immovable, belonging to the judgment-debtor, or over which, or the profits of which, he has a disposing power which he may exercise for his own benefit, whether the same be held in the name of the judgment-debtor or by another person in trust for him or on his behalf:
>
> Provided that the following particulars shall not be liable to such attachment or sale, namely :–
>
> .....
>
> (g) stipends and gratuities allowed to pensioners of the Government or of a local authority or of any other employer, or payable out of any service family pension fund

> notified in the Official Gazette by the Central Government or the State Government in this behalf, and political pension;"

9. A perusal of the above section goes to show that, while sub-section 1 enumerates the properties which are liable to attachment and sale in execution of a decree, the proviso (a) to (h) to the sub-section enumerate the properties which are not liable to attachment or sale in execution of a decree. Clause (g) of the said section which is relevant for the present purpose and which has been reproduced above, enumerates stipends and gratuities allowed to pensioners, as the items exempted from attachment and sale in execution of a decree passed by a Civil Court. It is not disputed by the petitioner that a pension is exempted from attachment and sale in execution of a decree passed by a Civil court under the provisions of the above section. The specific submission of Mr. Upadhyaya in the present case is that the impugned order being an order passed under section 125 of the Code of Criminal Procedure was not a decree passed by a Civil Court and, as such, it falls outside the purview of section 60 of Code of Civil Procedure. In support of his submission, the learned counsel placed reliance on the decision of the Hon'ble Supreme Court in State of Punjab

and another vs. Dina Nath reported in AIR 1984 SC 352. The observation of the Apex Court relied on by the learned counsel is as follows:-

> "On a plain reading of the said Section 60, it is clear that that section has no application to attachment and sale in any proceedings other than in execution of a decree of a civil court. The provision of Section 60 of the Code do not apply to an attachment and sale under any other statute unless made expressly applicable thereto."

10. It is clear from the above, that provision of section 60 of the Code of Civil Procedure does not apply to an attachment and sale under other statutes. The section would be applicable only if such statue makes the section expressly applicable. In the present case, the impugned order passed by the Family Court is one under section 125 of the Code of Criminal Procedure. It is not disputed that the Code of Criminal Procedure, 1973 does not provide anywhere that the provisions of section 60 of the Code would be applicable to attachment and sale made pursuant to any order passed under section 125 of the Code of Criminal Procedure. On the contrary, sub-section 3 of section 125 which deals with enforcement of the order passed under section 125 provides as follows:-

> "125. .....
>
> (3) If any person so ordered fails without sufficient cause to comply with

> the order, any such Magistrate may, for every breach of the order, issue a warrant for levying the amount due in the manner provided for levying fines, and may sentence such persons, for the whole, or any part of each month's allowance remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one month or until payment if sooner made:"

11. In addition to the above, section 128 which is supplementary to section 125(3) provides as follows:-

> **"128. Enforcement of order of maintenance.**– A copy of the order of maintenance shall be given without payment to the person in whose favour it is made, or to his guardian, if any, or to the person to whom the allowance is to be paid; and such order may be enforced by any Magistrate in any place where the person against whom it is made may be, on such Magistrate being satisfied as to the identity of the parties and the non-payment of the allowance due."

12. It may be noted that, besides the above provisions contained in Criminal Procedure Code, which is a general law of procedure specific provisions relating to enforcement and execution of maintenance order passed by a Family Court, have also been incorporated in the Family Courts Act, 1984. Therefore, a reference to the relevant section of the said Act is unavoidable. Section 18 of the said Act which provides for execution of decrees and orders passed by the Family Court is to the following effect:-

> **"18. Execution of decrees and orders.–**(1) A decree or an order [other than an order under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974)], passed by a Family Court shall have the same force and effect as a decree or order of a civil court and shall be executed in the same manner as is prescribed by the Code of Civil Procedure, 1908 (5 of 1908) for the execution of decrees and orders.
>
> (2) An order passed by a Family Court under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974) shall be executed in the manner prescribed for the execution of such order by that Code.
>
> (3) A decree or order may be executed either by the Family Court which passed it or by the other Family Court or ordinary civil court to which it is sent for execution."

13. A perusal of sub-section 1 of the above section would show that an order passed by the Family Court under section 125 which falls under chapter IX of the Criminal Procedure Code, 1973 cannot be equated with a decree of a Civil Court and consequently, the procedure prescribed for execution of decrees in the Code of Civil Procedure including exemption engrafted, if any, would not be applicable to it. Sub-section 2 of the same section further makes it clear that an order passed under section 125 of the Code of Criminal Procedure by the Family Court shall be executed in the manner prescribed for the execution of such order by that Code.

14. Section 125(3) and section 128 are the sections under the Criminal Procedure Code which prescribe the mode and the manner for execution of orders passed under section 125 of the Criminal Procedure Code. These sections have already been extracted above. A plain reading of these provisions would go to show that the amount payable under the order of maintenance is recoverable in the manner provided for levying fine and in case of failure of the husband to pay the amount he can be sentenced for whole or in part of each months allowance to imprisonment for a term which may extend to one month or until payment is made earlier. Absence of any provision in the relevant chapter of Code of Criminal Procedure making section 60 of the Code of Civil Procedure expressly applicable to the enforcement of maintenance order passed under section 125 of the Code of Criminal Procedure makes it abundantly clear that the restriction imposed by section 60 of the Code of Civil Procedure in the matter of attachment of pension cannot apply to attachment and sale to be initiated for enforcement of maintenance order passed by Family Court under chapter IX of the Code.

15. Even though the above is sufficient to clinch the issue, we may as well deal with one other submission

advanced by Mr. Chandak on the strength of a decision of Karnataka High Court before we pass on to the next point. What was submitted by Mr. Chandak is that, as per the decision of Karnataka High Court in Smt. Rangamma and others vs. C. S. Appaji Murthy and another reported in AIR 1989 NOC 52 (KANT.) a pension was not liable to attachment even in enforcement of order relating to maintenance. The decision relied on by the learned counsel is a Single Bench decision and reported in NOC section of the journal. The Head Note A relied on by him is as follows:-

> "(A) Civil P.C. (5 of 1998), S. 60(1) Proviso (g) – Gratuity payable to Government pensioner – Cannot be attached even in enforcement of order relating to maintenance."

Since the decision is reported in NOC section only, the learned counsel expressed his inability to produce detail judgment. Hence, the Court was deprived of the advantage of going through the detailed judgment. Even then, a reading of the above Head Note does make it clear that, what has been held by the single bench of Karnataka High Court in the case, is that, a gratuity payable to a Government pensioner is exempted from attachment even in case of enforcement of order of maintenance. It is, however, to be noted that this is a decision of a co-

ordinate authority and, as such, it is only of a persuasive value so far as this Court is concerned. The specific provisions contained in the Family Courts Act already extracted above are self-explanatory. Over and above, we have the clear decision of the Apex Court on the point in Dina Nath's case (supra). Such being the clear legal position, I cannot but express my respectful disagreement with the above view taken by the learned Single Bench of Karnataka High Court in the case cited above.

We cannot overlook the fact that the object of section 125 in providing speedy remedy is to prevent starvation of wives deserted by their husbands, of children and parents and thereby prevent vagrancy. Therefore, the reason why a pension payable to a husband has not been exempted from attachment and sale in the enforcement of an order passed under section 125 of the Criminal Procedure Code unlike a decree passed by a Civil Court is obvious. It is needless to say that, if a pension were to be exempted from attachment and sale even in execution of a maintenance order passed under section 125 of the Criminal Procedure Code on a par with the decree passed by a Civil Court, as contended by the learned counsel for the petition, the object with which the provision has been made would not be fulfilled. That the object and the

purpose behind the provisions contained in chapter IX of the Code of Criminal Procedure should not be lost sight of in the matter of enforcement of order of maintenance allowance would be clear from the following decisions as well.

In Ahmed Pasha vs. Wajid Unissa and Others reported in 1983 CRI.L.J. 479 a Single Bench of Andhra Pradesh High Court held that the attachment of salary for the purpose of recovery of arrears of maintenance was in accordance with law. Relying on this decision, another Single Bench of the same High Court in In Re : Yerasuri Lakshminarayana Murthy reported in 1986 CRI.L.J. 1846 gave wide interpretation to the word movable property so as to include salary within its ambit and held that salary of the husband can be attached under section 125(3) of the Code of Criminal Procedure for payment of maintenance to the wife.

16. The next submission made by Mr. Upadhyaya is that the impugned order is one passed by Family Court, and in view of this, the present petition ought to have been filed under the related provision of the Family Courts Act and not under the provisions of Criminal Procedure Code. Since the present revision petition has been filed

under the provisions of Code of Criminal Procedure and not under Family Courts Act the same was not maintainable.

17. In order to appreciate the contention of Mr. Upadhyaya, a reference to the relevant provision of the Family Courts Act is called for. Sub-section 4 and 5 of section 19 of the Family Courts Act inserted by Act 59 of 1991 which deal with appeals and revisions provide as follows:-

> "19. .....
>
> (4) The High Court may, of its own motion or otherwise, call for and examine the record of any proceding in which the Family Court situate within its jurisdiction passed an order under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974) for the purpose of satisfying itself as to the correctness, legality or propriety of the order, not being an interlocutory order, and, as to the regularity of such proceeding.
>
> (5) Except as aforesaid, no appeal or revision shall lie to any court from any judgment, order or decree of a Family Court."

18. While the above sub-section 4 makes it clear that any revision against an order passed by a Family Court under chapter IX of Code of Criminal Procedure would lie only to the High Court, the next following sub-section (5) make it crystal clear that no appeal or revision would lie to any other Court except the Court as provided for and specified in the preceding sub-section (4).

19. The above provisions, therefore, make it clear that ordinarily a party aggrieved by an order passed by a Family Court and desiring to go in appeal or revision must come under the provisions of Family Courts Act and not under the provisions of Code of Criminal Procedure. In this regard, a reference to a recent decision of this Court would not be out of place. It might be noted that this Court in Criminal Misc. Petition Nos.1 and 2 of 2005 - Sanjoy Menon Rajan vs. State of Sikkim and others decided on 20th July, 2005 had the occasion to consider somewhat a similar question and to observe that since the Family Courts Act is a special Act and it lays down detailed procedure, the same must be followed in adjudication of matrimonial disputes. Taking this view in the matter, a petition for dissolution of marriage filed in this Court directly bypassing the forum provided in the Family Courts Act was directed to be filed in the appropriate forum, i.e., the Family Court at the first instance, in terms of the procedure laid down therein. In the present case, the impugned order is an order passed by a Family Court under section 125 of the Code of Criminal Procedure. It would, therefore, be an order passed by a Matrimonial Court under the related provisions of Family Courts Act and as such, any party aggrieved by such order and

desiring to go in appeal or revision in the higher forum must, in ordinary course, follow the procedure laid down in the same Act for filing such appeal or revision and taking resort to similar provisions in other statues would be unwarranted.

20. Of course, Mr. Chandak, the learned counsel for the petitioner submitted that this Court in exercise of its inherent power could treat the present application as one filed under the provisions of Family Courts Act and entertain the same for the ends of justice. The power of this Court to treat the present revision petition as one filed under the provisions of Family Courts Act, 1984 in the interest of justice, as suggested by the learned counsel, may not be in doubt, yet it has to be noted that even if such a course of action is adopted, the relief sought for by the revision petitioner cannot be granted in view of the reasons already mentioned above. Therefore, the course of action suggested by the learned counsel, even if resorted to, would be an exercise in futility.

21. It, therefore, follows that there is no merit in the present revision petition. Accordingly, the revision petition is hereby dismissed. Consequently, the stay order dated 25th May, 2005 stands vacated.

22. In the circumstances of the case, there shall be no order as to costs.

23. Send a copy of this order to the concerned authority for information and compliance.

(A. P. Subba)
Judge
23-09-2005